Supreme Court, U. S.
FILED
OCT 16 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1979
No. 79-633

COUNTY OF VENTURA,

Petitioner,

v.

RUDY CASTRO, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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COUNTY OF VENTURA,

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PETITION FOR WRIT OF CERTIORARI

Petitioner County of Ventura respectfully prays that a writ of certiorari issue from this Honorable court to review the judgment of the Court of Appeal of the State of California entered in the above case on May 25, 1979.

OPINION BELOW

The opinion of Division Four of the Second Appellate District of the Court of Appeal of the State of California, attached hereto as Appendix A, is reported in 93 Cal. App.3d 462, 156 Cal. Rptr. 66.

Jurisdiction

The decision of the Court of Appeal of the State of California was entered on May 25, 1979. Thereafter petitioner County of Ventura filed a timely petition for hearing in the Supreme Court of the State of California, which petition was denied on July 19, 1979. A copy of the order denying hearing is attached as Appendix B.

Petitioner invokes the jurisdiction of this Court to review this decision under 28 U.S.C. section 1257(3), since the validity of a state statute has been drawn in question on the ground of its being repugnant to the Constitution of the United States.

QUESTION PRESENTED

Is California Welfare and Institutions Code section 11476.1; which authorizes the entry of a judgment of paternity, or of paternity and for periodic child support payments, or for periodic child support payments only, pursuant to a stipulation or agreement of the noncustodial parent with the district attorney, without the necessity of first filing and serving a civil summons and complaint; unconstitutional as a denial of due process because it does not expressly set out the procedural requirements for a valid pre-judgment waiver of rights?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV, in relevant part:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> " . . . "

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42, section 654 in relevant part:

"A State plan for child support must —

". . . .

"(4) provide that such state will undertake —

"(A) in the case of a child born out of wedlock with respect to whom an assignment under section 602(a)(26) of this title is effective, to establish the paternity of such child, unless the agency administering the plan of the State under part A of this subchapter determines in accordance with the standards prescribed by the Secretary pursuant to section 602(a)(26)(B) of this title that it is against the best interests of the child to do so, and

"(B) in the case of any child with respect to whom such assignment is effective, to secure support for such child from his parent . . . .

"(6) provide that (A) the child support collection or paternity determination services established under the plan shall be made available to any individual not otherwise eligible for such services upon application filed by such individual with the State, (B) an application fee for furnishing such services may be imposed, except that the amount of any such application fee shall

be reasonable, as determined under regulations of the Secretary, and (C) any costs in excess of the fee so imposed may be collected from such individual by deducting such costs from the amount of any recovery made; . . . "

California Welfare and Institutions Code section 11350.1 in relevant part:

"Notwithstanding the provisions of any other statute, in any action brought by the district attorney for the support of a minor child or children, the action may be prosecuted in the name of the county on behalf of such minor child or children. The mother shall not be a necessary part in such action but may be subpoenaed as a witness . . . ."

California Welfare and Institutions Code section 11475.1 in relevant part:

"Each county shall maintain a single organizational unit located in the office of the district attorney which shall have responsibility for promptly and effectively enforcing the obligation of parents to support their children and determining paternity in the case of a child born out of wedlock. The district attorney shall take appropriate action, both civil and criminal, to enforce this obligation when the child is receiving public assistance and when requested to do so by the individual on whose behalf the enforcement efforts will be made when the child is not receiving public assistance . . . ."

California Welfare and Institutions Code section 11476.1:

"In any case where the district attorney has undertaken enforcement of support, the district

attorney may enter into an agreement with the noncustodial parent, on behalf of the custodial parent, a minor child, or children, for the entry of a judgment determining paternity, if applicable, and for periodic support payments based on the noncustodial parent's reasonable ability to pay. Prior to entering into this agreement, the noncustodial parent shall be informed that a judgment will be entered based on the agreement. The clerk shall file the agreement without the payment of any fees or charges. The court shall enter judgment thereon without action. The provisions of Civil Code Section 4702 shall apply to such judgment. The district attorney shall be directed to effect service upon the obligor of a copy of the judgment and notify the obligor in writing of the right to seek modification of the amount of child support order upon a showing of changes of circumstances and upon such showing the court shall immediately modify the order and set the amount of child support payment pursuant to Section 11350, and to promptly file proof of service thereof.

For the purposes of this section, in making a determination of the noncustodial parent's reasonable ability to pay, the following factors shall be considered:

(a) The standard of living and situation of the parties;

(b) The relative wealth and income of the parties;

(c) The ability of the noncustodial parent to earn;

(d) The ability of the custodial parent to earn;

(e) The needs of the custodial parent and any other persons dependent on such person for their support;

(f) The age of the parties;

(g) Any previous court order imposing an obligation of support.

California Civil Code section 7006 in relevant part:

"(a) A child, the child's natural mother, or a man presumed to be his father under paragraph (1), (2) or (3) of subdivision (a) of section 7004, may bring an action as follows:

"(1) At any time for the purpose of declaring the existence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) section 7004.

" . . . .

" . . . .

(c) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under section 7004 or whose presumed father is deceased may be brought by the child or personal representative of the child, the State Department of Social Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor.

" . . . .

"(f) The district attorney may also bring an action under this section in any case in which he believes that the interests of justice will be served thereby."

California Code of Civil Procedure section 473 in relevant part:

" . . . .

"**Relief from judgment or order taken by mistake, etc.** The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken . . . .

"**Clerical mistakes; vacating void judgment or order.** The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order."

STATEMENT OF THE CASE

The proceedings in the trial court are set out in the opinion of the Court of Appeal of the State of California at 93 Cal. App.3d 462, 465-467, 156 Cal. Rptr. 66, 67-68, reproduced in Appendix A at pages 28-32, as follows:

"Prior to August 2, 1977, Viola Gonzales applied for welfare benefits from the County of Ventura. She informed the county employees

that she was pregnant and that Rudy Castro, Jr. was the father of her unborn child. The family support division of the office of the District Attorney of Ventura County wrote a letter to Mr. Castro requesting that he come into the Ventura County District Attorney's office to discuss the matter. On August 2, defendant came to the office in response to the letter and spoke to Juanita J. Hickman, a family support officer of the office of the district attorney.

"Ms. Hickman asked defendant if he was the father of the child and defendant stated that there were some doubts in his mind but 'more than likely I am the father.' Ms. Hickman explained to defendant his options. She explained that if he wished to agree to paternity of the unborn child, he could enter into an agreement of paternity with the district attorney's office which would be filed with the court and which would result in a judgment of paternity and an order that he pay child support. She told him that if he was not sure he was the father, the office would file a civil paternity action, serve him with summons and complaint, and he would have thirty days within which to file an answer and have a trial on the issue. She also explained that if he did nothing after the summons and complaint were served upon him, a judgment by default would be entered against him, resutling in an order requiring him to pay child support.

"She told him that Ms. Gonzales had nothing to do with bringing the action except that she had accepted welfare assistance and that any money paid by defendant for the support of the child would be used to reimburse the county for the

welfare assistance expended for the child. Defendant agreed to sign the agreement for judgment. He read and signed the agreement prepared by Ms. Hickman and was provided with a copy of the agreement.

"The agreement was filed with the Ventura County Superior Court on August 11, 1977. The agreement contains the following provisions:

'It is hereby agreed by plaintiff, through C. STANLEY TROM, District Attorney for the County of Ventura, and Rudy Castro, Jr., defendant, that the following facts are true and that a judgment be entered against the defendant in accordance with this agreement.

'1. Defendant acknowledges that the District Attorney of Ventura County, does not represent him and that he understands that he has had an opportunity to have an attorney advise and represent him in this matter.

'2. Defendant understands that a judgment for child support will be entered against him based upon this agreement.

'3. The defendant is the father of: unborn child of Viola Gonzales, due to be born December 1977.

'4. The defendant agrees to pay $125.00 per child per month commencing on Sept. 1, 1977, and on the same date each month thereafter until termination by operation of law or further order of court.'

"In addition, the agreement provides for payment of a $2.50 processing service charge per month, a mode of payment and address to

which payments are to be mailed, a requirement that defendant keep the district attorney's office apprised of his address, and an acknowledgment that if defendant should become two months in arrears in child support payments, his wages shall be assigned.

"On August 11, 1977, judgment for child support by agreement was entered by the Ventura County Superior Court. In that judgment, the court decrees that defendant is the father of the unborn child of Viola Gonzales and orders defendant to pay the sum of $125 per month child support 'until termination by operation of law or further order of court.'

"On February 9, 1978, defendant moved to set aside the agreement and the judgment entered thereon pursuant to Code of Civil Procedure section 473. Defendant's motion was supported by his declaration that at the time he visited the district attorney's office, he had serious doubts that he was the father of the child; that he was aware that the district attorney prosecutes criminal cases and feared that he could be sent to jail for refusal to sign the agreement; that he did not realize that he was giving up his right to trial by jury on the issue of paternity, his right to discovery, and his right to a blood test. He further stated that he was not aware that by signing the agreement he was agreeing to support an unborn child until the child reached the age of 18 years.

"Defendant averred that he did not sign the agreement freely and voluntarily but as the result of coercion and duress, nor did he understand the nature and consequences of the document.

"Opposition to the motion to set aside the judgment was supported by a declaration executed by Juanita Hickman setting forth the information she had provided to defendant and the explanation she had given him concerning his options. The contents of her declaration are as previously summarized in the summary of the facts. Her declaration concludes:

'At no time was Mr. Castro threatened in any fashion nor were any promises made to him to induce him to enter into this agreement. I made every attempt to explain to him his options to his satisfaction and answer his questions. There was no mention of any criminal action in any respect during our conversation nor was there any mention of the possibility of any jail sentence being imposed.'

"Defendant's motion to set aside the judgment was denied . . . ."

The case was appealed to the Court of Appeal of the State of California, Second Appellate District, Division Four. On May 25, 1979, the California Court of Appeal reversed the judgment of the Superior Court of the State of California, the trial court, with directions.

Thereafter, petitioner County of Ventura petitioned for hearing in the Supreme Court of the State of California. On July 19, 1979, the California Supreme Court denied a hearing. This petition for writ of certiorari was then filed.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

CALIFORNIA WELFARE AND INSTITUTIONS CODE SECTION 11476.1 IS CONSTITUTIONAL ON ITS FACE

INTRODUCTION

California Welfare and Institutions Code section 11476.1 was enacted in response to the Federal Governments' paternity and child support program, Title IV-D of the Social Security Act, 42 U.S.C. section 651 *et seq.* Under the California program the district attorneys of the state are required to act on behalf of minor children and custodial parents in determining paternty and in enforcing the child support obligations of noncustodial parents. (Cal. Welf. & Inst. Code § 11475.1; *see* 42 U.S.C. § 654.)

In this case the California Court of Appeal held that the judgment of paternity and child support must be set aside because the agreement for entry of judgment under California Welfare and Institutions Code section 11476.1 violated respondent Castro's right to due process under the Fourteenth Amendment to the United States Constitution.

Likening the agreement to a confession of judgment and declining to consider whether respondent Castro actually and in fact voluntarily, and knowingly and intelligently waived his rights to notice and hearing, the California Court of Appeal held that California Welfare and Institutions Code section 11476.1 violated the due process clause of the Fourteenth Amendment on its face because the statute contains no provision requiring that rights be expressly set out and enumerated in the agreement signed by the paternity or child support defendant, and because under the statute there is no judicial hearing or opportunity

for hearing prior to judgment as to the validity of the defendant's waivers, and because the defendant receives notice only after judgment has already been entered. (Opin., of Ct. of App., App. A., pp. 34-35, 37, 39).[1]

The California Court of Appeal erred in its analysis of the statute. Petitioner respectfully submits that California Welfare and Institutions Code section 11476.1 is constitutional on its face and that a writ of certiorari should issue.

A. If District Attorney — Noncustodial Parent Agreements are Indeed a Form of Confession of Judgment, The Decision Below Conflicts With the Decision of This Court Which Holds that a Confession of Judgment Is Not per se Unconstitutional.

In its decision, the California Court of Appeal likened California Welfare and Institutions Code agreements to confessions of judgment and found the statute unconstitutional as a denial of due process. The California Court of Appeal based its decision in this case upon *Isbell v. County of Sonoma* (1978) 21 Cal. 3d 61, 577 P.2d 188, 145 Cal. Rptr. 368, *cert. denied* as petition was untimely filed (1978) 439 U.S. 996.

Isbell is not before this court; however the line of reasoning found in *Isbell* and its interpretation of the

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[1] While referring to *D. H. Overmeyer Co. v. Frick Co.* (1972) 405 U.S. 174, and *Johnson v. Zerbst* (1938) 304 U.S. 458, the California Court of Appeal based its decision upon *Isbell v. County of Sonoma* (1978) 21 Cal.3d 61, 577 P.2d 188, 145 Cal. Rptr. 368, *cert. denied* as petition was untimely filed (1978) 439 U.S. 996, which held certain confessions of judgment to be unconstitutional as a denial of due process. (Op. of Ct. of App., App. A, pp. 33-34, 36-37, 39.) *Isbell* was decided solely upon federal constitutional grounds. (*See Isbell v. County of Sonoma, supra,* 21 Cal. 3d 61, 65, 75, 577 P.2d 188, 190, 196, 145 Cal. Rptr. 368, 370, 376.)

requirements for due process under the Fourteenth Amendment are before this Court because *Isbell* was followed by the California Court of Appeal in this case.

Isbell held that the California confession of judgment statute denied debtors due process under the Fourteenth Amendment because the statute did not permit prejudgment judicial determinations as to the validity of the debtors' waivers. The *Isbell* court noted that the availability of post judgment relief did not cure the unconstitutionality of the statute. In reaching its decision, the *Isbell* court concluded that *D.H. Overmeyer Co. v. Frick Co.* (1972) 405 U.S. 174, was not in point on the basis that *Overmeyer* did not hold that a confession of judgment procedure, which required the entry of judgment without a prior showing of waiver, complied with due process requirements. (*Isbell v. County of Sonoma, supra,* 21 Cal. 3d 61, 71-72, 74, 577 P.2d 188, 194-195, 145 Cal. Rptr. 368, 374-375.).

The California Supreme Court clearly erred in *Isbell* in not recognizing that this Court's holding in *D. H. Overmeyer Co. v. Frick Co., supra,* 405 U.S. 174, was controlling. In *Overmeyer*, this Court upheld the validity of a judgment entered on a cognovit containing a warrant of attorney.[2] Each of the parties to the action were

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[2]There are generally three types of confessions of judgment or cognovits. The first is a confession of liability prepared after service of process. The second is a confession of judgment executed before service of process but after an actual controversy has arisen between the parties. It waives notice and hearing. The third is incorporated in a contract or other legal document and confesses judgment in advance of legal controversy. It usually contains a consent to jurisdiction, a waiver of notice and hearing, and a warrant of attorney authorizing judgment. *See,* Note, Cognovit Revisited: Due Process and Confession of Judgment, 24 Hast. L.J. 1045-1046 (1973). *Overmeyer* involved the third type of cognovit, but, if a cognovit is involved in this case, it is of the second type.

business entities represented by counsel. The cognovit was a result of negotiations between the parties after a failure by Overmeyer to make payments to Frick under a construction subcontract. The Court held that a debtor could validly waive its rights to prejudgment notice and hearing and that Overmeyer had in fact knowingly, voluntarily, and intelligently executed the instrument containing the cognovit clause. Overmeyer's challenge to the facial constitutionality of a cognovit was rejected. The Court stated: "Our holding necessarily means that a cognovit clause is not, per se, violative of Fourteenth Amendment due process." (405 U.S. at 188.)

The Court clearly stated that cognovits are to be treated on a case by case basis:

> "Overmeyer could prevail here only if the clause were constitutionally invalid. The facts of this case, as we observed above, are important, and those facts amply demonstrate that a cognovit provision may well serve a proper and useful purpose in the commercial world and at the same time not be vulnerable to constitutional attack. . . . Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor received nothing for the cognivit provision, other legal consequences may ensue." (405 U.S. at 188-189.)

Despite this Court's clear pronouncement in *Overmeyer* that confessions of judgment are not per se unconstitutional, the California Supreme Court held in *Isbell* that a confession of judgment statute was unconstitutional per se under the Fourteenth Amendment because it did not provide for a prejudgment hearing on the defendant's waiver.

The decision in *Isbell* was reached in clear violation of this Court's conclusion in *Overmeyer* that confessions of judgment are not unconstitutional per se and must be analyzed on a case by case basis.

The California Court of Appeal in this case compounded the *Isbell* error by extending the erroneous holding of *Isbell* to invalidate agreements under California Welfare and Institutions Code section 11476.1 on the ground that the statute is unconstitutional per se. Like the California Supreme Court in *Isbell,* the California Court of Appeal failed to follow *Overmeyer* in this case.

Petitioner does not dispute that it is possible for individual agreements to be invalid on their own facts, but possible deficiencies in individual cases should not serve to invalidate the statute as a whole.

The statute in this case should not have been held unconstitutional per se.[3] A writ of certiorari should issue.

B. There Is a Conflict Among the Lower Courts on the Proper Application of *Overmeyer v. Frick* as to the Necessity of a Prejudgment Hearing.

Throughout this case the respondent Castro has contended and the California Court of Appeal held that the California statute violates due process because it does not provide for a hearing prior to entry of judgment (Opin. of Ct. of App., App. A., pp. 37.) In *Overmeyer v. Frick, supra,* 405 U.S. 174, this Court held that confessions of

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[3]Because it found the statute unconstitutional on its face, the California Court of Appeal did not analyze the specific facts in this case to determine whether the respondent validly waived his rights to notice and hearing.

judgment are not unconstitutional per se and that a debtor may validly waive his rights to notice and hearing and to present a defense on a note. In both *Overmeyer* and its companion case of *Swarb v. Lennox* (1972) 405 U.S. 191, the Court considered confession of judgment statutes which did not provide for prejudgment hearing on the validity of the waiver. Despite the fact that these statutes did not provide for a prejudgment hearing, lower courts are divided as to whether such a hearing is required.

The clash between the lower courts is evident in the decision of the three judge federal district court in *Tunheim v. Bowman* (D. Nev. 1973) 366 F. Supp. 1392. *Tunheim* involved a challenge to the constitutionality of Nevada's confession of judgment statutes. Plaintiffs alleged that the failure of the statute to provide for notice and hearing prior to judgment rendered them unconstitutional. The court dissolved the three judges panel, holding that prior controlling decisions rendered insubstantial any claim that the Nevada statutes were unconstitutional. The court stated:

> "The allegation that the Nevada confession of judgment statutes are on their face unconstitutional because they do not incorporate a requirement of prior notice and hearing before judgment is entered falls before the decision of the Supreme Court in *D. H. Overmeyer Co. v. Frick Co.,* 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124. . . . The *Overmeyer* case specifically holds that statutes legalizing cognovit clauses without a requirement of prior notice and hearing are not per se unconstitutional under the due process clause of the Fourteenth Amendment." (366 F. Supp. at 1393-1394.)

The *Tunheim* court went on to reject the interpretation of *Overmeyer* made by a federal district court in Delaware in a series of opinions beginning with *Osmond v. Spence*, (D. Del. 1971) 327 F. Supp. 1349, In *Osmond,* a three-judge federal court held that Delaware's confession of judgment statutes were unconstitutional because they did not provide prejudgment notice and hearing. On appeal, this Court ordered the case remanded in light of *Swarb* and *Overmeyer*. (405 U.S. 971 (1972).) On remand, the trial court maintained its original opinion that notice and hearing were required prior to entry of judgment. (D. Del. ((1972) 350 F. Supp. 124.) [4]

The *Tunheim* court disagreed with this interpretation of *Overmeyer*:

> "The *Overmeyer* case did not leave the question open. It specifically held that a statutory scheme which does not provide for notice and hearing prior to entry of a confessed judgment did not run afoul of due process requirements." (366 F. Supp. at 1394.)

The Maryland Court of Appeals holds a view similar to that expressed in *Tunheim*:

> "In any event, *Overmeyer* cannot be read to mandate a 'waiver hearing' prior to entry of a confessed judgment and, insofar as one may be required thereafter, it was clearly available to appellants at the hearing on their motion to vacate. No more is required." (*Billingsley v. Lincoln National Bank* (1974) 271 Md. 683, 693, 320 A.2d 34, 39.)

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[4]No further appeal was taken.

In accord with *Tunheim* and *Billingsley* are the decisions in *Irmco Hotels Corp. v. Solomon* (1975) 27 Ill. App.3d 225, 326 N.E.2d 542, 544; *State Finance Corp. v. McGee* (1975) 27 Ill. App.3d 421, 326 N.E.2d 518, 521; *Copeland Planned Futures v. Obenchain* (1973) 9 Wash. App.32, 510 P.2d 654, 657; and *Buckner v. Carmack* (La. Sup. Ct. 1973) 272 So.2d 326, 331, *app. dismissed* (1974) 417 U.S. 901. (*See also Colonial Bank & Trust v. Cahill* (N.D. Ill. 1976) 424 F. Supp. 1200; *Chittester v. LC-DC-F Employees of G.E. Credit Union* (W.D. Pa. 1974) 384 F. Supp. 475, 479.) In contrast, *Virgin Islands National Bank v. Tropical Ventures, Inc.* (D.V.I. 1973) 358 F. Supp. 1203, 1206-1208 (Federal district court ordered evidentiary hearing before it would approve confession of judgment) and *Scott v. Danaher* (N.D. Ill. 1972) 343 F. Supp. 1272, 1277-1278 (decided prior to *Overmeyer*) are in accord with *Osmond v. Spence, supra.*[5]

The conflicting interpretations of *Overmeyer* made by the lower courts as to the necessity of a prejudgment hearing illustrate the importance in resolving the constitutional requirements of due process within the context of this case. Accordingly a writ of certiorari should issue.

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[5]In addition to the conflict with respect to the necessity of a prejudgment hearing, lower courts also disagree as to the proper allocation of the burden of proof in a proceeding challenging the debtor's waiver. (*Cf. Osmond v. Spence, supra*, at 127 *with Virgin Islands National Bank v. Tropical Ventures, Inc., supra,* at 1207 and *Irmco Hotels Corp. v. Solomon, supra*.) In this case the California Court of Appeal did not consider the question of burden of proof and declined to determine the retroactivity, if any, of its holding. (Opin. of Ct. of App., App. A, p. 41, fn. 2.)

C. Even if *Isbell v. County of Sonoma*, Upon Which the California Court of Appeal Relied Is Sound Law, California Welfare and Institutions Code Section 11476.1, Which Authorizes the District Attorney and Noncustodial Parents to Enter Into an Agreement on Behalf of the Minor Child and Custodial Parent for Entry of Judgment of Paternity, or Paternity and Child Support, or Child Support Only, Without the Necessity of Filing and Serving a Summons and Complaint, Meets Constitutional Requirements for Due Process.

Under California Welfare and Institutions Code Section 11476.1, due process rights of both defendants and plaintiffs are protected. Indeed, defendants entering into agreements under this statute are afforded broader rights than found in traditional confession of judgment statutes, and agreements under California Welfare and Institutions Code section 11476.1 actually are functionally identical to stipulated judgments.

The touchstones of due process are flexibility and fairness. Essentially, due process requires that a defendant in a civil case be provided a meaningful opportunity for a hearing appropriate to the nature of the case. However, the hearing required by due process is subject to waiver. (*Boddie v. Connecticut* (1971) 401 U.S. 371, 377-379.)

> " '[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by the government action.' " (*Wolff v. McDonnell* (1974) 418 U.S. 539, 560.)

Here among the interests of both plaintiffs and defendants is the avoidance of lengthy and expensive litigation at a time when no real dispute between the parties continues to exist. California Welfare and Institutions Code section 11476.1 recognizes the interests of all parties and provides this expeditious, but fair method of settling lawsuits, qualitatively different from the traditional confession of judgment.

In its opinion, the California Court of Appeal noted that the striking feature of the confession of judgment at common law was its authorization for entry of the final judgment without notice, hearing or opportunity to defend. (Op. of Ct. of App., App. A, p. 34.)

In contrast, Welfare and Institutions Code section 11476.1 requires that the individual defendant be given notice in the sense the defendant must be advised that a judgment "*will be entered* based on the agreement." (Emphasis supplied.) Respondent Castro was advised twice on page one of the agreement in simple English that a judgment would (and not might) be entered against him. (Op. of Ct. of Appeal, App. A, p. 30.) In signing the agreement respondent Castro was agreeing that a judgment of paternity and a continuing money judgment for child support in a specific amount, in settlement of a specific controversy be entered immediately.

Implicit in the language "will be entered" in California Welfare and Institutions Code section 11476.1 is the requirement that the agreement be presented to the court for its consideration forthwith by either or both parties. This is not similar to a confession of judgment which may be for contingent liabilities and may never be entered or may lie dormant for years. Even if it is for money actually due, a confession of judgment is still unilateral and contingent upon the whim of the creditor while the

California Welfare and Institutions Code section 11476.1 agreement is bilateral and certain and enforcable by both parties in the same way a stipulation is.

It is significant to note that the judgment was actually filed nine days after respondent Castro signed the agreement, and that respondent Castro retained a copy of the agreement. (Op. of Ct. of App., App.A, pp. 29-30.) Clearly then respondent Castro not only knew that a judgment of paternity and for child support would be entered against him and knew exactly how much the continuing money judgment would be per month, he expressly agreed that it be entered. The judgment in this case was filed in a timely manner as it was supposed to be filed.

In addition, the statute requires that noncustodial parents receive notice of the actual entry of the judgment, presumably so the judgment may be appealed or otherwise attacked. In fact, in this very case respondent Castro made a vigorous attack upon the judgment based upon Code of Civil Procedure section 473. (Opin. of Ct. of App., App. A, pp. 31-32; *cf. Isbell v. County of Sonoma, supra,* 21 Cal.3d 61, 73, 577 P.2d 188, 195, 145 Cal. Rptr. 368, 375.) The statute also requires that noncustodial parents be advised of their right to seek modification of child support in the future based on changed circumstances.[6]

From the foregoing it is evident that far from being analogous to a confession of judgment, an agreement under Welfare and Institutions Code section 11476.1 is indeed functionally equivalent to a bilateral stipulation for

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[6]Respondent Castro also acknowledged on the face of the document that the district attorney did not represent him and that he understood that he had had an opportunity to have an attorney advise and represent him in this matter. (Opin. of Ct. of App., App. A, p. 30.)

entry of judgment with benefits for both parties, and of course, parties may by stipulation limit the issues tendered to a court for decision. (*Utah v. United States* (1969) 394 U.S. 89, 93.) A defendant clearly receives benefits by entering into such an agreement, in addition to the obvious saving of time and expense. The defendant may be able to negotiate a lower child support payment than would be ordered if the case were litigated. This amount could not be increased in the future without the defendant's consent unless there were a change of circumstances.

It is the position of petitioner County of Ventura that even if an agreement is absolutely limited to the express words of the statute, a constitutionally adequate waiver of notice and an opportunity to be heard clearly results because the defendant must be advised and must agree that a judgment will be entered based upon the agreement, because the defendant receives notice of the entry of the judgment, and further, because the defendant may later move to set the judgment aside under California Code of Civil Procedure section 473.

However, respondent Castro and with all due respect, the California Court of Appeal, appear to feel that there is magic in an all-inclusive statute and that to provide due process a statute must be procedurally exhaustive and express. While it might be both helpful and desirable for a statute to be drafted in such a manner, it is not constitutionally required. Indeed Rule 11 of the Federal Rules of Criminal Procedure, which sets out the pleas permitted to defendants in criminal proceedings, was not amended to require that federal trial courts advise criminal defendants of specific rights given up by the making of a guilty plea until long after *Boykin v. Alabama* (1969) 395 U.S. 238, 242-244, was handed down. It is fundamental that statutes should be construed so as to be constitutional if at

all possible and Welfare and Institutions Code section 11476.1 should be so construed.[7]

This Court should consider the facts in this case and determine whether respondent Castro was actually denied due process. (*Cf. Overmeyer Co. v. Frick Co., supra,* 405 U.S. 174, 188-189.) Petitioner County of Ventura submits that when the written agreement in this case is supplemented with what respondent Castro was in fact told by Ms. Juanita Hickman (see Statement of the Case, *supra,* pp. 29, 31-32.), it is clear that respondent Castro was not prejudiced in any conceivable way. Not only is this statute clearly constitutional on its face but was, moreover, certainly constitutionally applied, in this case.

Throughout California agreements for entry of judgment under California Welfare and Institutions Code section 11476.1 are significant in times when court delays are all too great and judicial resources are all too thin.

Like stipulations and consent decrees and default judgments where the defendant does not desire to contest the case, and indeed, settlements in general, these agreements for entry of judgment under Welfare and Institutions Code section 11476.1 are means for the parties to come to an agreement on issues where there is no real

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[7]Even if upon review this Court were to determine, as did the California Court of Appeal, that defendants should be advised in writing of some specific right not expressly mentioned in the statute, petitioner Ventura County submits that this Court should construe the language of the statute, that "the district attorney may enter into an agreement with the custodial parent" and that, "Prior to entering into this agreement, the noncustodial parent should be informed that a judgment will be entered based on the agreement," to require that agreements filed under Welfare and Institutions Code section 11476.1 contain such express language, but should not hold the statute unconstitutional on its face. (*Cf. Boykin v. Alabama, supra.*).

disagreement and leave only the contested case for trial. Agreements for entry of judgment allow both parties to know immediately what the judgment will be and save both parties, as well as the trial court the time and expense of a needless trial or other court proceeding and permit parties to solve their own problems. Determining that this statute is unconstitutional on its face has as its practical effect only more case backlogs in the trial courts and more crowded calendars.

The issue presented in this case is final[8] and is ripe for consideration by this Court at this time.[9]

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[8]The decision of the California Court of Appeal reversing the judgment of the California Superior Court and remanding the cause to the California Superior Court with directions to enter an order granting respondent Castro's motion to set aside the agreement for entry of judgment is clearly final on the federal constitutional issue of the constitutionality of Welfare and Institutions Code section 11476.1, as the California courts will recognize the holding as a part of the law of the case. (*See People v. Shuey* (1975) 13 Cal.3d 835, 841-843, 846, 533 P.2d 211, 215-217, 219, 120 Cal. Rptr. 83, 87-89, 91. *See also Kinney v. Vallentyne* (1975) 15 Cal.3d 475, 478, 541 P.2d 537, 538, 124 Cal. Rptr. 897, 898; *Davies v. Krasna* (1975) 14 Cal.3d 502, 507, 535 P.2d 1161, 1164, 121 Cal. Rptr. 705, 708.) The only court which can review the constitutionality of the statute is this Court. (*Cf. Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 485-486. *See also* Stern and Gressman, *Supreme Court Practice* (5th ed. 1978) § 312.).

[9]Petitioner County of Ventura is advised that in Los Angeles County, the District Attorney maintains some 500,000 paternity and child support files. The Los Angeles District Attorney keeps a log of cases listing those cases in which agreements for entry of judgments of paternity, paternity and child support, and child support only are entered when the files are sent from the branch offices to the central child support offices for legal review and processing for court action. From July through December 1976, a total of 7,455 cases were processed of which 53 per cent involved agreements for entry of judgment. From January through June 1977, a total of 8,533 cases were processed of which 54 per cent were for entry of judgment.

This statute is too important to both defendants and plaintiffs in child support and paternity proceedings to be lightly discarded, and thus a writ of certiorari should issue.

CONCLUSION

For the foregoing reasons, petitioners submit that a writ of certiorari should issue to review the decision of the Court of Appeal of the State of California.

Respectfully submitted,

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ROBERT H. PHILIBOSIAN, Chief Assistant
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During the period of July through December 1977, a total of 6,223 cases were processed of which 74 per cent were for entry of judgment. From January through June 1978, a total of 9,969 cases were reviewed of which 77 per cent were such agreements. From July 1978, through December 1978, a total of 10,217 cases were processed of which 80 per cent involved agreements for entry of judgment.

APPENDIX

In the Court of Appeal of the State of California

DIVISION FOUR
2d Civ. 54214
(Ventura Co. Super. Ct. No. D88353)

Filed May 25, 1979

COUNTY OF VENTURA,

Plaintiff and Respondent,

RUDY CASTRO, JR.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Ventura County. Roland N. Purnell, Judge. Reversed with directions.

King and Skeels and Paul Lockwood Skeels for Defendant and Appellant.

George Deukemejian, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Norman H. Sokolow and Andrew D. Amerson, Deputy Attorneys General, for Plaintiff and Respondent.

Channel Counties Legal Services Association, Stephen P. Wiman, Manuel Jose Covarrubias, Richard A. Weinstock and Robert Guerra, as amici curiae on behalf of defendant and appellant.

APPENDIX A

Defendant has appealed from the order denying his motion to set aside judgment for child support.[1] The judgment was entered pursuant to an agreement for the entry of judgment as authorized by Welfare and Institutions Code section 11476.1.

CONTENTIONS ON APPEAL

Appellant asserts that:

(a) Welfare and Institutions Code section 11476.1 is unconstitutional because it authorizes the entry of judgment without notice and opportunity to be heard, or adequate waiver thereof, and thus deprives defendant of due process of law; and

(b)the agreement for the entry of judgment is a contract between defendant and the District Attorney of the County of Ventura and is void.

Amici curiae contend that the statutory requirement that the court enter judgment pursuant to stipulation is violative of the doctrine of separation of powers.

SUMMARY OF THE FACTS

Prior to August 2, 1977, Viola Gonzales applied for welfare benefits from the County of Ventura. She informed the county employees that she was pregnant and that Rudy Castro, Jr. was the father of her unborn child. The Family Support Division of the Office of the District Attorney of Ventura County wrote a letter to Mr. Castro requesting that he come into the Ventura County District Attorney's office to discuss the matter. On August 2, defendant came to the office in response to the letter and spoke to Juanita J. Hickman, a family support officer of the office of the district attorney.

Ms. Hickman asked defendant if he was the father of the child and defendant stated that there were some doubts in his mind but "more than likely I am the father." Ms. Hickman explained to defendant his options. She explained that if he wished to agree to paternity of the unborn child, he could enter into an agreement of paternity with the district attorney's office which would be filed with the court and which would result in a judgment of paternity and an order that he pay child support. She told him that if he was not sure he was the father, the office would file a civil paternity action, serve him with summons and complaint, and he would have thirty days within which to file an answer and have a trial on the issue. She also explained that if he did nothing after the summons and complaint were served upon him, a judgment by default would be entered against him, resulting in an order requiring him to pay child support.

She told him that Ms. Gonzales had nothing to do with bringing the action except that she had accepted welfare assistance and that any money paid by defendant for the support of the child would be used to reimburse the county for the welfare assistance expended for the child. Defendant agreed to sign the agreement for judgment. He read and signed the agreement prepared by Ms. Hickman and was provided with a copy of the agreement.

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[1] Ordinarily, an order denying a motion to reconsider or vacate a judgment is not appealable. However, an appeal may be taken from the denial of a statutory motion to vacate. In the instant case, defendant moved pursuant to Code of Civil Procedure section 473 to set aside the judgment entered on the grounds of mistake, inadvertence, surprise, excusable neglect, duress, and undue influence. The order denying that motion is appealable. (*Winslow v. Ferguson* (1944) 25 Cal. 2d 274, 282.)

The agreement was filed with the Ventura County Superior Court on August 11, 1977. The agreement contains the following provisions:

> "It is hereby agreed by plaintiff, through C. STANLEY TROM, District Attorney for the County of Ventura, and Rudy Castro, Jr., defendant, that the following facts are true and that a judgment be entered against the defendant in accordance with this agreement.
>
> "1. Defendant acknowledges that the District Attorney of Ventura County does not represent him and that he understands that he has had an opportunity to have an attorney advise and represent him in this matter.
>
> "2. Defendant understands that a judgment for child support will be entered against him based upon this agreement.
>
> "3. The defendant is the father of: unborn child of Viola Gonzales, due to be born December 1977.
>
> "4. The defendant agrees to pay $125.00 per child per month commencing on Sept. 1, 1977, and on the same date each month thereafter until termination by operation of law or further order of court."

In addition, the agreement provides for payment of a $2.50 processing service charge per month, a mode of payment and address to which payments are to be mailed, a requirement that defendant keep the district attorney's office apprised of his address, and an acknowledgment that if defendant should become two months in arrears in child support payments, his wages shall be assigned.

On August 11, 1977, judgment for child support by agreement was entered by the Ventura County Superior Court. In that judgment, the court decrees that defendant is the father of the unborn child of Viola Gonzales and orders defendant to pay the sum of $125 per month child support "until termination by operation of law or further order of court."

On February 9, 1978, defendant moved to set aside the agreement and the judgment entered thereon pursuant to Code of Civil Procedure section 473. Defendant's motion was supported by his declaration that at the time he visited the district attorney's office, he had serious doubts that he was the father of the child; that he was aware that the district attorney prosecutes criminal cases and feared that he could be sent to jail for refusal to sign the agreement; that he did not realize that he was giving up his right to trial by jury on the issue of paternity, his right to discovery, and his right to a blood test. He further stated that he was not aware that by signing the agreement he was agreeing to support an unborn child until the child reached the age of 18 years.

Defendant averred that he did not sign the agreement freely and voluntarily but as the result of coercion and duress, nor did he understand the nature and consequences of the document.

Opposition to the motion to set aside the judgment was supported by a declaration executed by Juanita Hickman setting forth the information she had provided to defendant and the explanation she had given him concerning his options. The contents of her declaration are as previously summarized in the summary of the facts. Her declaration concludes:

> "At no time was Mr. Castro threatened in any fashion nor were any promises made to him to

induce him to enter into this agreement. I made every attempt to explain to him his options to his satisfaction and answer his questions. There was no mention of any criminal action in any respect during our conversation nor was there any mention of the possibility of any jail sentence being imposed."

Defendant's motion to set aside the judgment was denied, and this appeal followed.

CONSTITUTIONALITY OF WELFARE AND INSTITUTIONS CODE SECTION 11476.1

Appellant argues that the code section authorizing the entry of a judgment establishing paternity and an obligation to pay child support pursuant to stipulation is violative of due process. Welfare and Institutions Code section 11476.1 provides as follows:

"In any case where the district attorney has undertaken enforcement of support, the district attorney may enter into an agreement with the noncustodial parent, on behalf of the custodial parent, a minor child or children, for the entry of a judgment determining paternity, if applicable, and for periodic child support payments based on the noncustodial parent's reasonable ability to pay. Prior to entering into this agreement, the noncustodial parent shall be informed that a judgment will be entered based on the agreement. The clerk shall file the agreement without the payment of any fees or charges. The court shall enter judgment thereon without action. The provisions of Civil Code Section 4702 shall apply to such judgment. The district attorney shall be directed to effect service upon the

obligor of a copy of the judgment and notify the obligor in writing of the right to seek modification of the amount of child support order upon a showing of changes of circumstances and upon showing the court shall immediately modify the order and set the amount of child support payments pursuant to Section 11350, and to promptly file proof of service thereof.

For the purposes of this section, in making a determination of the noncustodial parent's reasonable ability to pay, the following factors shall be considered:

(a) The standard of living and situation of the parties;

(b) The relative wealth and income of the parties;

(c) The ability of the noncustodial parent to earn;

(d) The ability of the custodial parent to earn;

(e) The needs of the custodial parent and any other persons dependent on such person for their support;

(f) The age of the parties;

(g) Any previous court order imposing an obligation of support."

Appellant relies on the recent California Supreme Court decision, *Isbell v. County of Sonoma* (1978) 21 Cal. 3d 61, in support of his contention that the statute under consideration here is unconstitutional. In *Isbell,* the Supreme Court found unconstitutional the California Confession of Judgment statutes (Code Civ. Proc., § §

1132-1134). Appellant's analogy between the confession of judgment condemned there and the agreement for judgment procedure utilized here is well drawn. The *Isbell* court first observed that, under the due process clause of the federal Constitution, (p. 64): "[A] court may enter judgment against a defendant only if the record shows that either (a) the defendant has recieved notice and an opportunity to be heard, or (b) the defendant has voluntarily, knowingly and intelligently waived his constitional rights." In *Isbell,* the plaintiffs had allegedly received excess welfare benefit payments from the County of Sonoma. At the behest of a county representative, they executed confessions of judgment for the sums due and authorized the entry of judgment against them in those amounts. The confessions of judgment were filed with the court and judgments were thereupon entered for the confessed sums. The *Isbell* court observed that (p. 66): "The striking feature of the confession of judgment at common law lies in its authorization for entry of final judgment against a debtor without notice, hearing, or opportunity to defend." In this respect, we see no distinction between a confession of judgment and an agreement for judgment. Once the agreement has been executed, it may be filed at any time at the pleasure of the district attorney's office, without prior notice to defendant. Defendant receives notice only after judgment has been entered against him. " . . . all courts agree that a judgment entered pursuant to such a confession is constitutional only if the confession constitutes a *valid waiver* of the debtor's due process rights. [Citations.]" (*Isabell, supra,* at p. 68.)

Respondent argues that the waiver by defendant in this case was knowing and voluntary and makes reference to the declaration of Juanita Hickman concerning her conversation with defendant. We recognize that we must

resolve any factual dispute between appellant and respondent in favor of respondent. However, our inquiry here must be not whether this defendant knowingly and intelligently and voluntarily waived his right to notice and hearing, but whether the statute makes provision for such waiver. The *Isbell* court at page 65 summarized its holding as follows: "Because the California statutes provide insufficient safeguards to assure that the debtor in fact executed a voluntary, knowing, and intelligent waiver, . . . we conclude that the confession of judgment procedure established in sections 1132 through 1135 violates the due process clause of the Fourteenth Amendment."

In the instant case, the statute under consideration makes no provision for protection of the due process rights of the noncustodial parent, nor does it address the issue of the manner in which defendant shall be permitted to waive those rights. The only provision with respect to information which must be provided to the defendant is the following sentence: "Prior to entering into this agreement, the noncustodial parent shall be informed that a judgment will be entered based on the agreement." (Welf. & Inst. Code, § 11476.1.) Glaringly absent from the provisions is any requirement that the defendant be informed that he has a right to trial on the issues of paternity and his obligation to support the minor child.

Waiver of constitutional rights is never presumed. (*D.H. Overmyer Co. v. Frick Co.* (1972) 405 U.S. 174, 186.) Yet, in the instant case, we are called upon to presume that a defendant knowingly, intelligently, and voluntarily waived his right to notice and an opportunity to be heard when the statute contains no requirement that he even be made aware of those rights.

Nor does the document executed by defendant reflect such a knowing and voluntary waiver. The court is instructed to enter judgment based on the agreement.

However, the required waiver of due process rights could not be apparent to the court on the face of the document executed herein. No mention is made in the agreement of an understanding on the part of defendant that he has a right to a trial on the issue of paternity and child support and that he is freely giving up that right.

In *Isbell, supra,* the Supreme Court concluded that the confessions of judgment executed therein demonstrated neither the voluntary character of any waiver of due process rights nor that such waiver was knowing or intelligent. The court observed the disparity of bargaining power between the creditor who prepared the agreement, in that case the County of Sonoma, and the debtor. The court observed that the drastic nature of the document which resulted in the debtor's advance waiver of all possible defenses and of the right to be notified of the existence of the proceeding against him, strongly implied overreaching on the part of the creditor and precluded the indulgence in a presumption that the execution of the document by the debtor was voluntary. (*Isbell v. County of Sonoma, supra,* at pp. 69-70.)

In the instant case the agreement was entered into between a lay person and an employee of the office of the district attorney. The declaration of defendant that at the time of the discussion with Ms. Hickman he believed that he could be sent to jail for refusal to sign the agreement and believed that refusal to sign the agreement would result in "dire consequences," is, of course, uncontradicted in the record and eminently reasonable. It is common knowledge that the district attorney's office prosecutes criminal cases. We would be blinding ourselves to reality if we were to presume that an agreement such as the one in the case at bar were voluntarily executed in the absence of some express evidence of that fact. As stated in *Isbell,* at page 70, "[A] court presented only with the verified confession

of judgment cannot assume the voluntariness of any waiver of due process rights implicit in that confession."

By the same token, the mere fact that the defendant read and executed the agreement does not demonstrate that he knowingly and intelligently waived the rights lost by that execution. Absent an express statement in the agreement setting forth the rights to which defendant is entitled and stating that he understands those rights and knowingly waives them, we must " 'indulge every reasonable presumption against waiver' of fundamental constitutional rights." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.)

Finally, the statute makes no provision for any pre-judgment judicial determination on the issue of waiver. The statute directs that once an agreement for judgment has been filed, "the court shall enter judgment thereon without action." Similar language in the Confession of Judgment statutes was found infirm because it did "not provide for a case by case determination of the validity of the debtor's waiver." (*Isbell, supra,* at p. 71.)

Code of Civil Procedure section 1134 directs the *court clerk* to enter judgment upon the filing of a written confession. Welfare and Institutions Code section 11476.1 directs that the judgment shall be entered by the *court.* However, neither statute requires or provides an opportunity for a judicial determination of the validity of any constitutional waivers. Respondent seeks to persuade us that the analogy drawn between confessions of judgment and agreements for judgment is erroneous. Respondent contends that the fact that defendant is informed that judgment will be entered based on the agreement, that he is informed that he has the right to consult an attorney, and that he is provided with a copy of the agreement, serve to distinguish the two documents. But we believe that the position of the parties in this case, and the direct and collateral consequences of the execution of an agreement

for judgment concerning paternity and child support, demand even closer constitutional scrutiny.

Defendant was informed that if he signed the agreement for judgment, he would be obligated to pay $125 per month child support until termination by operation of law or further order of court. He was also advised that the money was to be paid to the county, not to Ms. Gonzales, as reimbursement so long as she was accepting welfare benefits. He was further advised that if at any time he became two months in arrears in child support payments, his wages could be assigned. However, he was not advised that he could be subject to criminal prosecution for failure to support the child as ordered. On the contrary, Ms. Hickman's declaration states: "There was no mention of any criminal action in any respect during our conversation nor was there any mention of the possibility of any jail sentence being imposed." In fact, Penal Code section 270 provides that the failure to support one's child is a misdemeanor punishable by fine and/or incarceration.

Of additional concern is the fact that the explanation given to the defendant and the agreement which he signed imply that the obligation assumed is only to the County of Ventura so long as the mother of the minor child is receiving welfare aid. However, it is not unlikely that were such aid to terminate, the mother would seek child support payments directly from defendant. The execution of the agreement by defendant, admitting paternity, would be admissible as evidence on that issue in any subsequent support action. (See *Salas v. Cortez* (1979) ____ Cal. 3d ____, slip op. p. 10; Pen. Code, § 270e.)

Both the California Legislature and the California courts have in recent years severely limited the use of confessions of judgment or cognitive provision. (See for example *Hulland v. State Bar.* (1972) 8 Cal. 3d 440, 449; *Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal. 3d 294, 307; *Brooks v. Small Claims Court* (1973) 8 Cal. 3d 661; *Blair v. Pitchess* (1971) 5 Cal. 3d 258, 275-276.) An example of legislative concern is the 1975 amendment to Code of Civil Procedure section 1132. That section now provides that in any sale or loan primarily for household, family or personal use, judgment may be entered on a confession only if an attorney who independently represents the defendant certifies that he has advised the defendant concerning his rights and the waiver thereof and his defenses, and that the attorney has recommended the use of the confession of judgment procedure.

What we view as a trend toward providing protection against the entry of judgments without notice, where due process rights may not have been waived, is properly followed in this case. The judgment here will deprive defendant of personal property and may deprive him of his freedom. Any statute authorizing the entry of a judgment under such circumstances must contain adequate safeguards to assure that defendant's rights to due process are properly waived.

Therefore, an agreement for judgment or a judgment entered pursuant to Welfare and Institutions Code section 11476.1 is constitutionally defective.

SEPARATION OF POWERS

Amici curiae attack the constitutionality of section 11476.1 of the Welfare and Institutional Code on the ground that it violates the doctrine of separation of powers. Article III, section 3, of the California Constitution provides as follows: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

Amici curiae contend that section 11476.1 "effectively transfers the power to render a judgment of paternity and for child support from the court to the district attorney." Amici argue that the effect of section 11476.1 is to preclude the trial court form holding an evidentiary hearing so as to make an independent determination of the fact of paternity and the amount of support to be awarded based on the parent's reasonable ability to pay. Instead, we are told, the statute gives this fact-finding power to the district attorney.

We disagree. The statute does not come into play unless there has been an agreement between the district attorney and the noncustodial parent as to paternity and as to the amount of child support payments based on his reasonable ability to pay. The effect of such as agreement is to declare that there is no dispute as to the facts which require resolution by an evidentiary hearing. We see no rational purpose which would be served by requiring an evidentiary hearing in all civil child support actions. The court system should not have this additional burden thrust upon its overcrowded docket.

In the field of criminal law where lives and freedom are at stake, our highest courts have recognized the importance to the court system of permitting the prosecutor and the accused to work out plea bargaining agreements which avoid a trial. (*Santobello v. New York* (1971) 404 U.S. 257; *People v. West* (1970) 3 Cal. 3d 595.) We see no reason to impose a more restrictive concept concerning civil actions.

The statute in question does not violate the doctrine of separation of powers, and if an agreement for judgment were executed based on a statute which respected defendant's right to due process of law, as discussed hereinabove, a judgment could properly be entered thereon.[2]

THE VALIDITY OF THE AGREEMENT

Appellant contends that the agreement for judgment entered into herein was in fact a contract and as such is voidable because: (a) defendant acted under duress and did not freely consent to the terms of the contract; (b) the defendant's consent was obtained by mistake of fact, in that he was misinformed with respect to the anticipated birthdate of the child; (c) the agreement was executed by defendant while he was operating under a mistake of law, in that he did not understand that he was assuming an obligation to support the child until the child reached the age of 18; and (d) the contract was executed without consideration flowing to the defendant.

Whether the agreement herein is interpreted as a contract (see *L.A. City School Dist. v. Landier Investment Co.* (1960) 177 Cal. App.2d 744, 750-751) or a stipulation (see *Harris v. Spinali Auto Sales, Inc.* (1966) 240 Cal. App.2d 447, 452-454), analysis of this issue is unnecessary to the resolution of this case. If the agreement herein were found to be void or voidable, that finding would be based on an examination of the facts in this case. We have determined that the agreement for judgment and judgment entered herein are void, the authorizing statute being unconstitutional. It is therefore unnecessary to determine whether the agreement is also invalid as violative of the rule governing contracts or stipulations.

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[2] Amici request that we give retroactive effect to the holding in this case. We decline on these facts to address the issue of retroactivity.

The order denying defendant's motion to set aside the judgment is reversed and the cause remanded with directions to enter an order granting defendant's motion setting aside the agreement for the entry of judgment, and the judgment. Costs on appeal are awarded to appellant.

CERTIFIED FOR PUBLICATION.

ALARCON, J.

We concur:

KINGSLEY, Acting P.J.

JEFFERSON (Bernard), J.

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL

2d District, Division 4
Civil No. 54214

In the Supreme Court of the State of California

IN BANK

COUNTY OF VENTURA

v.

CASTRO, JR.

Respondent's petition for hearing DENIED.

SUPREME COURT
FILED
JULY 19, 1979
G.E. BISHEL, Clerk

Deputy

BIRD

Chief Justice

APPENDIX B

Supreme Court, U. S.
FILED
NOV 15 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 79-633

COUNTY OF VENTURA,

Petitioner,

v.

RUDY CASTRO, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

RESPONDENT'S BRIEF IN OPPOSITION

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In the Supreme Court of the United States

October Term, 1979
No. 70-633

COUNTY OF VENTURA,

Petitioner,

RUDY CASTRO, JR.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Respondent RUDY CASTRO, JR. hereby respectfully requests that this court deny the petition for Writ of Certiorari, seeking review of the judgment of the Court of Appeal of the State of California.

Respondent agrees with petitioner's introductory statements under the items entitled, "Opinion Below," "Jurisdiction," "Constitutional Provisions Involved," "Statutory Provisions Involved," and "Statement of the Case."

Respondent does not agree with petitioner's statement under the heading, "Question Presented."

QUESTION PRESENTED

Is California Welfare and Institutions Code § 11476.1, unconstitutional in authorizing the entry of a judgment of paternity, or of paternity and for periodic child support payments, or for periodic child support payments only, pursuant to a stipulation or agreement between an alleged non-custodial parent and the District Attorney, because it will deprive that alleged parent of personal property, and may deprive him of his freedom, without notice and hearing, and with inadequate safeguards to assure that his rights are voluntarily, knowingly and intelligently waived?

REASONS WHY A WRIT OF CERTIORARI SHOULD BE DENIED

INTRODUCTION

The Court of Appeal of the State of California properly held that California Welfare and Institutions Code § 11476.1 is unconstitutional, because it denies a person, such as respondent, his due process rights to notice and hearing prior to the entry of a judgment against him.

Because the statute contains absolutely no provision for notice of entry of judgment prior to the fact of entry, nor an opportunity for a hearing prior to that entry, and because the statute provides no means to assure that the obligor has made a voluntary, knowing, and intelligent waiver, it is an abridgement of due process rights.

Therefore, the Court of Appeal of the State of California properly ruled that the statute is unconstitutional, and furthermore, the Supreme Court of the State of California acted properly in denying the Petition for Hearing on July 19, 1979.

REASONS

A. The Decision of the California Court of Appeal Is not Inconsistent with the Decision of this Court in *Overmeyer v. Frick*, Which Held that a Confession of Judgment Is not Per Se Unconstitutional.

In deciding the case that is now before this court, the California Court of Appeal followed the reasoning of the California Supreme Court in the case of *Isbell v. County of Sonoma* (1978) 21 Cal.3d 61, 577 P.2d 188, 135 Cal. Rptr. 368, *cert. denied* (1978) 439 U.S. 996. The California Supreme Court in *Isbell* concluded that the California confession of judgment statutes do not permit a pre-judgment judicial determination of the validity of the debtor's waiver, but instead, required the clerk to enter judgment upon a document which is ordinarily insufficient to demonstrate a valid waiver. The California Supreme Court in deciding *Isbell*, applied the reasoning of this court in *D. H. Overmeyer Co. v. Frick Co.* (1972) 405 U.S. 174, which stated:

> "Our holding, of course, is not controlling precedent for other facts in other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor received nothing for the cognovit provision, other legal consequences may ensue. 405 U.S. 188.

The court in *Isbell* reviewed the background of the California confession of judgment statutes, and looked into the circumstances of the transaction, and it clearly appeared that the contract was one of adhesion, there was great disparity in bargaining power between the parties, and the debtor received nothing in exchange for the cognovit provision. Furthermore, the situation in *Isbell*

was not a commercial transaction, such as that which was ruled upon in *Overmeyer*.

Obvious differences between the Ohio procedure before this court in *Overmeyer* and the California procedure reviewed in *Isbell* are that the Ohio procedure provides for notice of entry of the judgment and for a post-judgment hearing at which the defendant can vacate the judgment if a valid defense exists.

The California Court of Appeal, in the case before the court, followed the guidelines set forth by this court in *Overmeyer*, as well as the reasoning of the California Supreme Court in *Isbell*. Welfare and Institutions Code § 11476.1 provides no protection for due process rights of the alleged non-custodial parent, and it does not address the issue of the manner in which he shall be permitted to waive those rights; nor is there any requirement that he be informed that he has the right to trial on the issues of paternity and his obligation to support the minor child. There was certainly no equality of bargaining power, contrary to the situation of the parties in *Overmeyer*, and in effect, the contract was one of adhesion.[1] Respondent, summoned into the office and machinery of the District Attorney's office, stood on a far different footing with

[1] "In the instant case, the agreement was entered into between a lay person and an employee of the office of the District Attorney. The declaration of defendant that at the time of the discussion with Ms. Hickman he believed that he could be sent to jail for refusal to sign the agreement, and believed that refusal to sign the agreement would result in 'dire consequences' is, of course, uncontradicted in the record and eminently reasonable. It is common knowledge that the District Attorney's office prosecutes criminal cases. We would be blinding ourselves to reality if we were to presume that an agreement such as the one in the case at bar was voluntarily executed, in the absence of some express evidence of that fact." *County of Ventura v. Castro* (1979) 93 Cal. App.3d 462, 156 Cal. Rptr. 66.

respect to the creditor than did *Overmeyer*, a corporation with subsidiaries spreading across thirty states, and represented by corporate counsel at the time of the negotiations.

Furthermore, California Welfare and Institutions Code § 11476.1 leaves no discretion to the clerk or the judge to inquire into the circumstances of the signing of the document. That statute states, in part, ". . . the clerk shall file the agreement . . . . The court shall enter judgment thereon without action . . . ." There is no pre-judgment procedure, nor even a post-judgment procedure, to enable the court to examine the validity of the waiver, and to determine whether it was a voluntary, knowing and intelligent waiver.

For the foregoing reason, the ruling of the California Court of Appeal in this case is consistent with this court in *Overmeyer v. Frick*, and the petition for a writ of certiorari should be denied.

B. There Is No Real Conflict Among the Lower Courts on the Proper Application of *Overmeyer v. Frick.*

The cases cited by petitioner at page 19 of its brief, as being consistent with *Overmeyer v. Frick,* involved situations where the statute either provided for notice of entry of judgment and an opportunity for post-judgment hearing on valid defenses, or were cases dealing with execution and garnishment procedures arising out of confessed judgments, in which the question of the validity of the confession of judgment procedure itself was not expressly before the court.

In contrast, the court in *Osmond v. Spence* (D. Del. 1971) 327 F. Supp. 1349, dealt with a statutory proce-

dure which provided for no notice of entry of judgment and no opportunity for a post-judgment hearing of a valid defense. While the court in that case indicated that notice of entry of judgment should precede entry of final judgment the actual holding is limited to a finding that the statutes are unconstitutional based on the total absence of notice of entry of judgment and opportunity for a hearing at any time. Furthermore, the court in *Osmond v. Spence* did not void all prior judgments by confession, but required only procedures allowing judgment debtors with a valid defense to apply for a hearing. Similarly, the California Supreme Court in *Isbell, supra,* did not invalidate all prior judgments by confession, but required that judgment debtors with a valid defense be allowed to apply for a hearing.

The case of *Virgin Islands National Bank v. Tropical Ventures, Inc.,* (D.V.I 1973) 358 F. Supp. 1203, involved a federal court action which had been filed but in which defendant did not appear. The court required that before that plaintiff's attorney was allowed to have a judgment entered on a confession of judgment, he was required to notify the defendants of an opportunity to challenge the waiver of constitutional rights. The case is of little value as a precedent in the cases in which a statutory confession of judgment procedure exists.

It therefore appears that the only cases in which statutory procedures have been ruled unconstitutional are *Osmond,* as that case now before the court, in which no provisions for either a pre-judgment hearing or a post-judgment hearing are made. These cases are therefore not inconsistent with *Overmeyer* or the other lower court cases referred to by petitioner.

C. The Cases Cited by Petitioner to Support Its Claim Involved Ordinary Commercial Transactions Instead of Fundamental Rights and Obligations of Paternity and Support, Which Should Be Entitled to a Higher Degree of Protection.

Overmeyer v. Frick states:

> "Our holding, of course, is not controlling precedent for other facts in other cases." (405 U.S., p. 188).

The facts in the case now before the court and the facts in *Overmeyer v. Frick,* dealing as it did with an ordinary commercial transaction, are quite different.

Respondent contends that a person such as respondent whose legal status as a non-parent will be changed into that of a parent merely upon the signing of a piece of paper with all the consequences of the creation of that status, which will affect him for years, is deserving of greater protection, and the transaction should be subjected to greater scrutiny, than that afforded by Welfare and Institutions Code § 11476.1.

As examples of the affect of his status as a parent, respondent's relationship of paternity and the obligations created thereby may not be terminated by bankruptcy. They will continue until the child reaches the age of 18, and possibly even longer (California Civil Code §§ 196 and 206). The failure of the parent to support the child may well subject him to wage garnishment, execution upon property, civil contempt (California Civil Code § 196[a]), and criminal non-support, with the attendant possibilities of fine and imprisonment (California Penal Code § 270).

Futhermore, in a paternity suit, the defendant is entitled to engage in extensive pre-trial discovery (California Code of Civil Procedure §§ 2016 *et seq.*), is entitled to demand and require that the parties and the child submit to blood tests (California Evidence Code § 893), the right to call and cross-examine witnesses (California Code of Civil Procedure § 607), and the right to a trial by jury (California Constitution Article VI, Section 11; California Code of Civil Procedure § 904). All of these rights are lost when a person, such as respondent, signs the agreement that was presented to him by the District Attorney's office, and there is no requirement that he even be advised of their existence.

The California Supreme Court has held that in paternity matters the interests involved are fundamental and entitled to a high degree of protection. In the consolidated cases of *Salas v. Cortez and David M. v. Castellanos* (1979) 24 Cal. 3d 22, 593 Pac. 2d 226, 154 Cal. Rptr. 529, in which that court declared that indigent defendants in civil paternity actions are entitled to court-appointed counsel, it was stated:

> "The cases before this court involve more than monetary judgments. They were brought under statutory authority to declare the existence of the most basic biological relationship, that of parent and child. (Welf. & Inst. Code §§ 11350.1, 11475.1; Civ. Code §§ 7001, 7006; cf. *Boddie v. Connecticut, supra,* 401 U.S. at p. 383). A determination of paternity has grave implications for all concerned — the alleged father, the child, the mother, and the state. This court has termed the interest in maintaining a parent-child relationship "a compelling one, ranked among the most basic of civil rights . . . ." (In re B.G. [1974] 11 Cal. 3d 679, 688; *Cleaver v. Wilcox, supra,* 499 F.2d at p. 945). Freedom from an incorrect imposition of that relationship on either a parent or a child is an equally compelling interest . . . . An adjudication of paternity may profoundly affect a person's life. It may disrupt an established family, and damage reputations. Further, a court's determination of paternity exposes a defendant to deprivation of property, and, potentially, liberty." 154 Cal. Rptr. at 533.

In contrast, *Overmeyer,* a large corporation, was attempting to avoid liability on a money judgment which it had agreed to, with the assistance of its own attorneys, and no "compelling" or "fundamental" rights were involved. What is at stake here is not only the alleged father's right to an opportunity to be fully informed about the nature and consequences of signing the agreement presented to him, but also the right of the child to an accurate determination of paternity. Those consolidated cases of *Salas v. Cortez and David M. v. Castellanos,* Op. Cit. stated this right as follows:

> "The child, to a large extent forgotten in such proceedings, has been termed the "principal plaintiff" in a paternity action (*Krauss, supra,* p. 108). In a sense, it is the child's identity that is litigated in a proceeding to determine parentage. Any determination that a particular individual is a child's biological father may have profound sociological and psychological ramifications. Further, the child's rights of support and inheritance against the father are at issue, as well as his or her future obligation to support the father (Civ. Code § 206). "If the child is to have

> anything, it must have a *right* to have his paternity ascertained in a fair and efficient manner" (*Krause, supra,* p. 113, emphasis in original). It is in the child's interest not only to have it adjudicated that *some* man is his or her father and thus liable for support, but to have some assurance that the correct person has been so identified. When the state initiates paternity proceedings, whether on behalf of the mother (as in *Salas v. Cortez*) or the child (as in *David M. v. Castellanos*), the state owes it to the child to ensure that an accurate determination of parentage will be made." 154 Cal. Rptr. at 537.

All of the foregoing apply equally to the circumstances in this case. Because the statute requires the judge and clerk to enter a judgment of paternity based upon the written agreement, without any assurance that respondent's fundamental rights of notice and hearing are voluntarily, knowingly, and intelligently waived, and indeed, without any assurance that there is a factual basis for a finding of paternity, the statute violates such person's Fourteenth Amendment rights.

D. It Readily Appears from the Opinion of the Court of Appeal Below that Respondent Did Not in Fact Voluntarily, Knowingly and Intelligently Waive his Due Process Rights when he Signed the Agreement in Question.

Petitioner claims that, in effect, by signing the agreement for judgment, the respondent voluntarily, knowingly, and intelligently waived his due process rights. It is true that the printed form constituting the agreement stated that the District Attorney did not represent him, that he understood that he had an opportunity to have an attorney

to advise him, and that a judgment would be entered against him. However, many of respondent's legal rights, which the agreement did *not* state, and all of which go to the question of whether, in their absence, it can reasonably be said that respondent voluntarily, knowingly, and intelligently waived his due process rights are listed below:

1. That no law required him to sign the agreement at that time and place, and that no criminal consequences would follow his failure to do so.

2. That if he failed to sign the agreement, the District Attorney, to proceed against him further, must file a civil summons and complaint.

3. That if such a civil complaint were filed and served on him, he would have thirty days thereafter within which to file a written answer denying the allegations.

4. That he would have the right to ask for a jury trial, which would take place at some later date.

5. That during the course of the proceedings he would have the right to take the deposition of the mother, conduct discovery by written interrogatories, and to take the depositions of other witnesses.

6. That he would have the right to demand that the mother and child submit to blood tests to determine paternity or non-paternity.

7. That at all stages of the proceedings he had the right to have an attorney of his own choice represent him.

8. That at a trial, he would have the right to call and cross-examine witnesses against him.

9. That if the judgment of the judge or jury were against him, he would have the right to appeal.

10. That any civil support obligation made against him could not be discharged in bankruptcy.

11. That the child support obligation could be enforced by garnishment, execution on real or personal property, by civil contempt, and by criminal proceedings for non-support, with the possible penalties of fine and imprisonment.

Petitioner does not contend that these rights were explained to respondent. It is obvious that a layman, such as respondent, cannot be presumed to understand that the foregoing rights exist, by signing a piece of paper that merely states that a "judgment will be entered based on the agreement."

Petitioner also argues that an agreement under Welfare and Institutions Code § 11476.1 is indeed functionally a bilateral stipulation for entry of judgment, with benefits for both parties. It is difficult to find any benefit to respondent that arose out of the agreement. If respondent and the District Attorney were more equally balanced in terms of bargaining power, there might be some plausibility to petitioner's statements that:

> "A defendant clearly receives benefits by entering into such an agreement, in addition to the obvious saving of time and expense. The defendant may be able to negotiate a lower child support payment, than would be ordered if the case were litigated." (Petition for Writ of Certiorari, p. 23)

But nowhere does the petitioner state that respondent was in fact able to negotiate a lower child support payment. And, as the opinion of the Court of Appeal in this case states at page 36 of petitioner's brief:

> "The declaration of defendant that at the time of the discussion with Ms. Hickman he believed he could be sent to jail for refusal to sign the agreement and believed that refusal to sign the agreement would result in "dire consequences", is, of course, uncontradicted in the record and eminently reasonable."

For these reasons, respondent contends that the result in this case would have been the same had the Court of Appeal decided whether respondent in fact voluntarily, knowingly and intelligently waived his rights, because it is clear from the record that he did not.

CONCLUSION

Petitioner seeks to place before the court statistics that were not in evidence at the hearing of this matter, concerning the quantity of paternity and child support files in Los Angeles County. Respondent does not dispute that a ruling in his favor may have consequences in other cases, but the consequences are salutary, namely, that persons such as respondent, who did not understand the nature and consequences of their action in signing an agreement for the entry of a judgment of paternity, or for paternity and child support payments, or for child support payments only, against them, will have the opportunity to have the judgments entered on those agreements set aside, and an opportunity to have a trial on the merits, if they so desire. If only one person is properly determined not to be the father of a child, as a result of the decision against the constitutionality of Welfare and Institutions Code § 11476.1, then justice will have been served.

As the California Supreme Court stated in *Salas, supra:*

> "The state's interests in denying counsel to indigent paternity defendants is largely financial. Respondents argue it will require a greater

> expenditure of public funds if indigent defendants, as well as plaintiffs, are represented at public expense. In addition, it may become more difficult to identify potential fathers and establish paternity, if defendants have the full benefits of the adversary system. However, the state has no legitimate interest in incorrectly ascribing parentage and imposing the obligations of fatherhood on someone other than the child's actual father." (*Op. cit.*, 154 Cal. Rptr. at 536.)

The statute in question was not "lightly discarded" by the court, as petitioner claims. On the contrary, the California Court of Appeal properly ruled that the procedure concerned, under the circumstances presented in this case, violates the Fourteenth Amendment due process rights that are afforded to all persons by our Constitution. The decision is in accord with the principles set forth in this court in *Overmeyer v. Frick,* and as a result, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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